FH
[redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

MPA/167409

PRELIMINARY RECITALS

Pursuant to a petition filed July 17, 2015, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Division of Health Care Access and Accountability in regard to Medical Assistance, a hearing was held on August 10, 2015, at Racine, Wisconsin.

The issue for determination is whether the Department of Health Services, Division of Health Care Access and Accountability (DHS) correctly denied the Petitioner's request for occupational therapy services.

NOTE: The record was held open to allow Petitioner's aunt and therapist to submit copies of Exhibits 5-8, which were labeled fax batches 1-5. One additional nine page fax was submitted by Petitioner's therapist that was marked as Exhibit 9. With permission of Petitioner's aunt / representative, Exhibits 5-9 were provided to DHS's consultant, Ms. Chucka. Their written response has been marked as Exhibit 10 and entered into the record.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

[redacted]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: OIG by letter
Division of Health Care Access and Accountability
1 West Wilson Street, Room 272
P.O. Box 309
Madison, WI 53707-0309

ADMINISTRATIVE LAW JUDGE:
Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [redacted]) is a resident of Racine County.

2. Petitioner is eight years old and has been diagnosed with mental retardation and Attention Deficit Hyper Activity Disorder a.k.a. ADHD. She has been determined to suffer from lack of coordination and muscle weakness. (Testimony of Petitioner's aunt; Exhibit 3; Exhibit 4; Exhibit 9)

3. On March 30, 2015, [redacted], the Petitioner's occupational therapist, submitted on behalf of Petitioner, a request for prior authorization of 26 weeks of therapy consisting of 52 sessions of "Therapeutic procedure", 104 sessions of "Therapeutic activities", 52 sessions of "Neuromuscular procedures" and 52 sessions of "Development of Cognitive Skills" at a cost of $13,000. (Exhibit 3)

4. The stated goals of the requested therapy are:

    a. Demonstrate improved postural stability, coordination, static and dynamic balance with 75% or greater success to skip, gallop, hopscotch, trampoline, gym class, & recess games and activities.

    b. Demonstrate sustained attention to task, timely processing, in synchrony to a repetitive auditory input stimulus to increase ability to follow 2-3 step directions with minimal to no prompting in 3 / 5 tries.

    c. Demonstrate self-awareness, monitoring and self-correction, using therapeutic strategies for sustained attention/focus for 10-15 minutes, 3/5 consecutive sessions for positive learning behavior.

    d. Demonstrate balance/coordination and focus for age/grade level ball skills (catch, throw, kick, dribble) demonstrating 50% or greater accuracy, minimal prompting.

    e. Demonstrate oral motor, strength, coordination, and awareness to decrease drooling, using therapeutic activity program, given minimal facilitation, 20% or greater of the time.

    (Exhibit 3 – January 18, 2015 Plan of Care)

5. On April 13, 2015, DHS sent [redacted] a letter, indicating that they needed additional information. DHS directed [redacted] to do the following:

    a. Re-evaluate your goals. Emphasis should be on functional self-care. Goals must be related to functional outcome.

    b. Discuss how goals and rehabilitation potential are supported by the frequency/duration requested.

    c. Describe the specific skills of a therapist that are needed to help the patient meet her goals.

    d. Describe the reason why someone other than a therapist cannot safely and effectively implement the requested procedures.

e. Describe the reason, based on the member's cognitive, physical, communication, or resource status, that a home program, equipment, or environmental adaptations alone cannot meet the member's needs.

f. Provide evidence of significant functional progress in the last six months.

g. Provide evidence of skill gained in therapy carry over to other settings within six months.

h. Discuss how goals and rehabilitation potential are supported by the number of sessions requested.

(Exhibit 3)

6. On April 25, 2015, [redacted] submitted a corrected PA request, seeking the same level of occupational therapy for the Petitioner. This PA was submitted under [redacted] employer, [redacted] However, the information requested on April 13, 2015, was not provided. (Exhibit 3)

7. On May 12, 2015, DHS sent [redacted] a letter, indicating that DHS had not yet received the information it requested on April 13, 2015 and that it needed additional information to justify the request for occupational therapy services. (Exhibit 3)

8. On May 18, 2015, [redacted] sent DHS a response that included another copy of the Plan of Care and a letter from [redacted]. (Exhibit 3)

9. On June 5, 2015, DHS sent the Petitioner and [redacted] notices advising them that the request for therapy was denied. (Exhibit 3)

10. The Petitioner's aunt filed a request for fair hearing that was received by the Division of Hearings and Appeals on July 17, 2015. (Exhibit 1)

DISCUSSION

In the case at hand, the Petitioner requests authorization for an extension of occupational therapy services. Petitioner has the burden to prove, by a preponderance of the credible evidence, that the requested level of therapy meets the approval criteria. *See* Estate of Gonwa ex rel Gonwa v. Wisconsin Dept. of Health and Family Services, 265 Wis.2d 913, 668 N.W.2d 122, 2003 WI App. 152.

Medical assistance covers occupational therapy if the recipient obtains prior authorization after the first 35 visits. Wis. Adm. Code § DHS 107.17(2)(b).

The Department of Health Services sometimes requires prior authorization to:

1. Safeguard against unnecessary or inappropriate care and services;
2. Safeguard against excess payments;
3. Assess the quality and timeliness of services;
4. Determine if less expensive alternative care, services or supplies are usable;
5. Promote the most effective and appropriate use of available services and facilities; and
6. Curtail misutilization practices of providers and recipients.

Wis. Admin. Code § DHS107.02(3)(b)

"In determining whether to approve or disapprove a request for prior authorization, the department shall consider:

1. The medical necessity of the service;
2. The appropriateness of the service;
3. The cost of the service;
4. The frequency of furnishing the service;
5. The quality and timeliness of the service;
6. The extent to which less expensive alternative services are available;
7. The effective and appropriate use of available services;
8. The misutilization practices of providers and recipients;
9. The limitations imposed by pertinent federal or state statutes, rules, regulations or interpretations, including Medicare, or private insurance guidelines;
10. The need to ensure that there is closer professional scrutiny for care which is of unacceptable quality;
11. The flagrant or continuing disregard of established state and federal policies, standards, fees or procedures; and
12. The professional acceptability of unproven or experimental care, as determined by consultants to the department."

Wis. Admin. Code §DHS107.02(3)(e)

"Medically necessary" is a legal term, referring to medical treatment that is:

(a) Required to prevent, identify or treat a recipient's illness, injury or disability; and
(b) Meets the following standards:
    1. Is consistent with the recipient's symptoms or with prevention, diagnosis or treatment of the recipient's illness, injury or disability;
    2. Is provided consistent with standards of acceptable quality of care applicable to the type of service, the type of provider, and the setting in which the service is provided;
    3. Is appropriate with regard to generally accepted standards of medical practice;
    4. Is not medically contraindicated with regard to the recipient's diagnoses, the recipient's symptoms or other medically necessary services being provided to the recipient;
    5. Is of proven medical value or usefulness and, consistent with s. DHS 107.035, is not experimental in nature;
    6. Is not duplicative with respect to other services being provided to the recipient;
    7. Is not solely for the convenience of the recipient, the recipient's family, or a provider;
    8. With respect to prior authorization of a service and to other prospective coverage determinations made by the department, is cost-effective compared to an alternative medically necessary service which is reasonably accessible to the recipient; and
    9. Is the most appropriate supply or level of service that can safely and effectively be provided to the recipient.

Wis. Adm. Code. §DHS 101.03(96m)

In addition to the above criteria, when there is a request for the extension of services, Wis. Admin Code §DHS 107.17(3)(e) states:

> (e) *Extension of therapy services.* Extension of therapy services shall not be approved beyond the 35-day per spell of illness prior authorization threshold in any of the following circumstances:
>
> 1. The recipient has shown no progress toward meeting or maintaining established and measurable treatment goals over a 6-month period, or the recipient has shown no ability within 6 months to carry over abilities gained from treatment in a facility to the recipient's home;
>
> 2. The recipient's chronological or developmental age, way of life or home situation indicates that the stated therapy goals are not appropriate for the recipient or serve no functional or maintenance purpose;
> 3. The recipient has achieved independence in daily activities or can be supervised and assisted by restorative nursing personnel;
>
> 4. The evaluation indicates that the recipient's abilities are functional for the person's present way of life;
>
> 5. The recipient shows no motivation, interest, or desire to participate in therapy, which may be for reasons of an overriding severe emotional disturbance;
>
> 6. Other therapies are providing sufficient services to meet the recipient's functioning needs; or
>
> 7. The procedures requested are not medical in nature or are not covered services. Inappropriate diagnoses for therapy services and procedures of questionable medical necessity may not receive departmental authorization, depending upon the individual circumstances.

In its letter, DHS indicates that it denied the current request for occupational therapy services, because it could not determine whether the Petitioner has benefitted from prior therapy, nor whether continued therapy would provide a benefit.

One of the problems that DHS pointed out was that the last evaluation of the Petitioner was completed in April 2014 before the Petitioner had been diagnosed and treated for ADHD. According to the fair hearing request, the Petitioner has since been medicated to treat the ADHD and her "attention and focus has improved and her impulsivity has declined". (Exhibit 1) As such, it is unclear whether the deficits observed in April 2014 were caused by Petitioner's ADHD or whether they were caused by Petitioner's other neurological problems, or her physical problems.

Concurrently, there is no objective means of determining whether Petitioner's improvement, if any, over the last year was due to the occupational therapy she received or whether it was attributable to the management of her ADHD.

Without evidence that the occupational therapy improved the Petitioner's condition over the last six months, the prior authorization request must be denied pursuant to Wis. Admin Code §DHS 107.17(3)(e)1.

DHS also denied the prior authorization, because [redacted] failed to provide objective measurements of the Petitioner's abilities and failed to effectively incorporate those measurements into the Petitioner's goals.

Looking at the plan of care created in April 2014 and comparing it to the plans of care created in October 2014, January 2015 and April 2015, it is difficult to determine whether the Petitioner benefitted from treatment.

For example, the April 2014 plan of care indicated that one of the Petitioner's goals was to fasten three, ½ inch buttons in two of three tries, but it does not state what her current ability was. So, did she start at being completely incapable of fastening a button; could she only do it in one of three tries? There is no way to know, because the plan of care did not state a base line. Curiously there, there is an April 13, 2014, progress note that indicates the Petitioner's baseline is an ability to unbutton, button and align six, ½ buttons in two minutes. The progress note goes on to state that the Petitioner progressed by being able to unbutton and button five, 3/8 inch buttons in two minutes 15 seconds.

Confusing things further is the fact that the progress note does not correlate with the plan of care and Petitioner's therapist uses three different measures of ability in stating the therapy goal and in measuring progress. In the therapy goal, the measurement is done in terms of the completion of the task within three attempts; in the progress note, the measurement is done in terms of the number of times the task is completed within a certain amount of time and button size.

Then, after April 13, 2014, there is no mention of that goal. So, it is unclear whether the goal was met and if so, whether the Petitioner is now independent with the task of dressing.

Here is another example of the lack of clear writing in the plans of care and progress notes: In the October 2014 plan of care, there is a stated new goal to "demonstrate balance/coord. & focus to manipulate (catch, throw, kick, dribble) ball with 90% accuracy", but it is unclear what is meant by "accuracy", particularly in terms of dribbling a ball.

The new goal of therapy in the January 2015 plan of care (on which the subject PA is based), is to "demonstrate balance/coordination & focus for age/grade level balls (catch, throw, kick, dribble) demonstrating 50% or > accuracy, minimal prompting." So, there are again mixed measures of progress and ability. In one instance being "accurate", then in another, the ability to manipulate a certain size ball. This again, makes it difficult to get a clear idea of whether the Petitioner is making progress.

A third example is the April 2015 progress dated April 17, 2015 (Exhibit 7); it describes the progress Petitioner made towards demonstrating oral motor and eye hand strength a coordination for meals and eating as "significant progress". It is unclear what is meant by this. The progress note then contradicts itself, stating, some regression occurred and that the Petitioner did not carry over oral motor exercises. It is unclear what "regression" means. Further, if there is no carry over, then therapy cannot be approved pursuant to Wis. Admin Code §DHS 107.17(3)(e).

A fourth example is a January 18, 2015 progress note, which states that "With return to school & OT, she has been disorganized, impulsive, talking out and over peers. Constant movement, falling out of chair, disturbing other on carpet, and unable to keep hands to herself or grad the force used when she touches obj/people, has had poor focus/attention. She is just beginning to get back to previous

status." This would again seem to indicate a lack of carryover from therapy and raise concerns about the efficacy of therapy.

There are more examples where the stated goal and the described progress don't match up, in terms of the measurements used to determine the Petitioner's baseline ability and progress made and there are more examples of goals disappearing with little explanation.

This case is a close call, because it is clear that the Petitioner has a number of impairments. However, what is not clear is the Petitioner's current level of ability and how it compares to her level of ability six months ago or a year ago.

Petitioner's mother provided anecdotal evidence of improvement through her testimony, but without clear, objective measurements, there is no way to know for certain whether occupational therapy is having a significant impact upon the Petitioner.

In summary, [redacted] did not include sufficient objective, measurements of Petitioner's prior and current levels of ability, nor did [redacted] provide measurements that were consistent between the established goal and attempts to measure progress. Without a consistent, objective measurement of where the Petitioner was before therapy started and where the Petitioner is now, there is no way to know whether she has made reasonable progress.

In the absence of sufficient information showing progress toward meeting or maintaining measureable treatment goals it is found that pursuant to Wis. Admin Code §DHS 107.17(3)(e), DHS correctly denied the request for authorization of occupational therapy services.

Once the Petitioner is stabilized on her ADHD medications, Petitioner's provider may, at any time, file a new prior authorization request that contains the requisite information. Petitioner's therapist expressed concerns about the Petitioner regressing. If Petitioner's condition has changed, her provider can file a new prior authorization request. However, it should be noted to the Petitioner that her provider, [redacted], will not receive a copy of this Decision. So, the Petitioner might wish to share this decision with her provider.

CONCLUSIONS OF LAW

DHS correctly denied [redacted]'s March 30, 2015 request for prior authorization of occupational therapy services.

THEREFORE, it is **ORDERED**

That the petition is dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision.** Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge

made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee, Wisconsin, this 17th day of September, 2015.

\sMayumi M. Ishii
Administrative Law Judge
Division of Hearings and Appeals

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on September 17, 2015.

Division of Health Care Access and Accountability